

GILBERT KEESTER
v.
ACTING ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-141-A

Decided September 24, 1991

Appeal from a decision dismissing as untimely an appeal concerning range stocking rates.

Reversed.

1. Indians: Leases and Permits: Farming and Grazing--Rules of Practice: Appeals: Timely Filing

Under 25 CFR 166.6, stocking rates on Indian range units are to be monitored and adjusted as conditions warrant. Accordingly, an appeal from a stocking rate is not necessarily untimely merely because it was not filed when the grazing permit was issued.

2. Administrative Procedure: Burden of Proof--Indians: Leases and Permits: Farming and Grazing

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

APPEARANCES: Terry L. Pechota, Esq., Rapid City, South Dakota, for appellant; Jean W. Sutton, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Gilbert Keester seeks review of a July 27, 1990, decision of the Acting Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the stocking rate for range unit (RU) 516 on the Pine Ridge Reservation, South Dakota. For the reasons discussed below, the Board of Indian Appeals (Board) reverses the Area Director's decision, but declines to order a reduction of the stocking rate.

Background

Appellant is an enrolled member of the Oglala Sioux Tribe. On February 14, 1986, he received grazing permit No. 14-20-A06-4203, covering RU 516 on the Pine Ridge Reservation. The permit ran from November 1,

1985, through November 30, 1990. ^{1/} It allowed appellant to graze 108 head of cattle yearlong, with an annual rental of \$9,049.95.

The administrative record shows that RU 516 was created by removing acreage from RU 517, which had previously been permitted to several individuals on an in-common basis. The record also shows that there have been extensive discussions concerning both units among BIA and the various permittees.

The present appeal arises from requests by appellant to the agency Superintendent (Superintendent) that the stocking rate for RU 516 be reviewed and lowered because the land had been overgrazed. Appellant alleged that, because of this overgrazing, his cattle were being forced to eat selenium-contaminated grass, with the result that he had lost several head of cattle. The record shows that agency staff reviewed the stocking rate and offered various forms of assistance to appellant.

By letter dated May 2, 1990, appellant, through counsel, informed the Superintendent that he was appealing the "administrative actions regarding [appellant's] problems with the stocking rate on Range Unit No. 516." It is not clear from either the record or appellant's filings whether he was appealing a specific decision of the Superintendent, or instead intended to elevate the entire matter to the Area Director. It appears probable that no specific decision rendered by the Superintendent was being appealed.

By letter dated July 27, 1990, the Area Director held that appellant did not file a timely appeal. The Area Director found that appellant knew the stocking rate for RU 516 when he signed the contract in 1986, and any appeal from the rate should have been filed when the contract was signed.

The Board received appellant's notice of appeal from this decision on August 29, 1990. No briefs were filed.

Discussion and Conclusions

Appellant first argues that his notice of appeal to the Area Director was not untimely. Appellant contends that he has objected to the stocking rate since the beginning of his permit term and that because the rate is to be continually monitored and adjusted as conditions may change, an appeal filed after the initiation of the permit period may still be timely.

[1] 25 CFR 166.6 states:

Subject to approval of the Area Director, the Superintendent shall prescribe the maximum number of livestock which may be grazed on each range unit and the season, or seasons, of use

^{1/} The Board has been informed by the Land Operations Office, Pine Ridge Agency, BIA (agency), that appellant received another permit for RU 516, with a term extending from Dec. 1, 1990, through Oct. 31, 1995.

to achieve the objectives cited in § 166.3 [2/]. The grazing capacity so prescribed will take into consideration the implementation of tribal objectives and programs requiring grazeable land to support wildlife and other nonlivestock uses. Stocking rates shall be reviewed on a continuing basis and adjusted as conditions warrant. [Emphasis added.]

The Board takes administrative notice of the fact that BIA issues grazing permits for varying lengths of time. In the present appeal, the permit period is 5 years. The Board also takes administrative notice of the fact that significant changes to the condition of grazing lands can occur within a 5-year period. In view of these facts and the significant objectives of preservation and restoration set forth in 25 CFR 166.3, the Board declines to hold that a grazing permittee can only file an appeal from the stocking rate at the time the permit is signed. Such a holding would defeat the intent of the regulations to provide continual monitoring of the condition of a range unit in order to protect and preserve the range as a resource available to a tribe and its members. Accordingly the Board holds that appellant's notice of appeal was not untimely because it was not filed when the contract was signed. Because of this holding, the Area Director's decision must be reversed.

This reversal, however, does not dispose of appellant's appeal. Appellant also argues that the stocking rate for RU 516 should have been lowered based upon a review of the physical condition of the unit, and apparently asks the Board to order a reduction in the stocking rate. In order to provide some guidance to BIA in this matter, the Board will consider the history of interaction between appellant and the agency concerning the stocking rate for RU 516. The Board considers this history in the absence of reference to a specific Superintendent's decision from which appellant is appealing.

Appellant's primary contention is that the stocking rate must be too high because his cattle eat grass contaminated with selenium and they would not eat this grass if other forage was available. Appellant concludes that the fact that his cattle eat the selenium-contaminated grass proves that all other forage has been consumed before the end of the grazing season, which in turn proves that the stocking rate is too high.

2/ Section 166.3 states:

"It is the purpose of the regulations of this part to:

"(a) Preserve, through proper grazing management, the land, water, forest, forage, wildlife, and recreational values on the reservations and improve and build up these resources where they have deteriorated.

"(b) Promote use of the range resource by Indians to enable them to earn a living, in whole or in part, through the grazing of their own livestock.

"(c) Provide for the administration of grazing privileges in a manner which will yield the highest return consistent with sustained yield land management principles and the fulfillment of the rights and objectives of tribal governing bodies and individual land owners."

The administrative record shows that members of the agency staff met with and discussed both the stocking rate and selenium issues with appellant on several occasions, and that a lively correspondence has arisen between appellant and the agency. The record further indicates that the agency thoroughly reviewed the stocking rate, and determined it to be appropriate. In addition, it appears to be the agency's position that the selenium problem could be mitigated through the use of range management practices that differ from those appellant has used in the past. Several specific suggested changes to appellant's prior range management practices are set forth in the record.

[2] Appellant bears the burden of proving that the agency decision complained of is erroneous or not supported by substantial evidence. See Dahl v. Assistant Portland Area Director, 20 IBIA 225 (1991); S & H Concrete Construction, Inc. v. Acting Phoenix Area Director, 20 IBIA 176 (1991), and cases cited therein. After reviewing the administrative record, including appellant's arguments which are set forth both in letters to the Superintendent and in his notice of appeal, the Board finds that appellant has failed to carry his burden of proving error in BIA's determination of the stocking rate on RU 516. The BIA decision is based upon an analysis of the actual conditions present on RU 516 and is supported by substantial evidence in the administrative record.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 27, 1990, decision of the Acting Aberdeen Area Director dismissing this appeal as untimely is reversed. The Board declines, however, to order BIA to decrease the stocking rate on range unit 516. 3/

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

3/ This opinion does not preclude future discussions between appellant and BIA concerning the stocking capacity of RU 516, if appellant can show that range conditions have changed.